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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of: WILLIE BROWN (Chapter 7 Case 89-40705 Debtor SARAH BROWN Plaintiff v. WILLIE BROWN Defendant	Adversary Proceeding Number 89-4066

FILED
at 11 O'clock & 05 min. A M
Date 10/6/89
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia pcB

MEMORANDUM AND ORDER

The trial of the above-captioned complaint to determine dischargeability of a debt and for relief from stay was held on August 18, 1989. Based on the evidence and applicable authorities I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) The parties were married in January, 1977, and remained so until 1984 when they separated. At that time the parties lived in the State of Kansas and the wife is still a resident of that state.

2) Husband filed a divorce action in 1987, and a decree terminating the marriage was entered. However, no alimony award or division of property was contained in said action.

3) In August, 1987, after the husband's case was filed, the wife filed her own divorce action seeking a divorce decree and alimony. The husband was properly served in the State of Georgia where he was then residing.

4) The husband attempted to have that action dismissed on a jurisdictional objection but his motion was denied and the divorce case was tried in April, 1989, resulting in a judgment in favor of the wife. That judgment contained an order requiring the husband to pay wife the sum of $11,976.52 which represented the amount of money husband had received from the United States Army for BAQ Dependent Support Allowance less those sums of money which

husband had actually paid over to wife during that period of time. Thereafter, husband sought to obtain from the Kansas trial court a stay pending his appeal of that decision. The trial court denied the motion for stay pending appeal in the absence of the posting of a $15,000.00 supersedeas bond.

5) That appeal is still pending, although husband has not posted the required supersedeas bond. Debtor's Chapter 7 case was filed on May 17, 1989. An examination of the schedules reveals that the only debt which husband seeks to discharge is the indebtedness to his ex-wife arising out of the April, 1989, decree.

Husband takes the position that the obligation contained in the Kansas decree should be determined to be dischargeable because the Court made no independent finding as to what level of support was necessary for the wife. Wife contends that the husband's failure to pay over to her the minimum support requirements established under Army regulations, the amount set forth in the Kansas court's decree, is a sufficient basis on which to determine that the resulting debt is non-dischargeable. Since the Kansas court awarded the unpaid amount of that BAQ "to prevent the unjust enrichment of the respondent and to provide the past due support to which the petitioner is entitled", she concludes that the

effect of the decree was to provide necessary support to her and that said indebtedness should be declared non-dischargeable.

CONCLUSIONS OF LAW

11 U. S. C. Section 523(a)(5)[1] creates an exception from discharge of any debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child . . . ", but only if the debt is "actually in the nature

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[1] 11 U.S.C. Section 523(a)(5) provides that:

> (a) A discharge . . . does not discharge an individual debtor from any debt--
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> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . ; or
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

of alimony, maintenance, or support". There is ample controlling authority in the Eleventh Circuit and the Southern District of Georgia in interpreting and applying 11 U.S.C. Section 523(a)(5).[2] The Eleventh Circuit has made it clear that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state law". Harrell, 754 F.2d at 905 (quoting H. R. Rep. No. 595, 95th Cong., 1st Sess. 364 (1977) reprinted in 1978, U. S. Code Cong.& Admin. News 5787, 6319). To be held non-dischargeable, the debt must have been actually in the nature of alimony, maintenance, or support. Harrell, 754 F.2d at 904. A determination is made by examining the facts and circumstances existing at the time the obligation was created, not at the time of the bankruptcy petition. Harrell, 754 F.2d at 906.[3]; Accord Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Draper v. Draper, 790 F.2d

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[2] In re Harrell, 754 F.2d 902 (11th Cir. 1985); Matter of Crist, 632 F.2d 1226 (5th Cir. 1980), cert. denied, 451 U.S. 986 (1981) cert. denied, 454 U.S. 819 (1981); In re Holt, 40 B.R. 1009 (S. D. Ga. 1984) (Bowen, J.); In re Bedingfield, 42 B.R. 641 (S. D. Ga. 1983) (Edenfield, J.).

[3] In rejecting the analysis in In re Warner, 5 B.R. 434 (Bankr. D. Utah, 1980), Harrell overrules Bedingfield only to the extent that it held that "the bankruptcy courts may examine the debtor's ability to pay . . . at the time of the bankruptcy proceeding". Bedingfield 42 B.R. at 646. The fact that the circumstances of the parties may have changed from the time the obligation was created is not relevant to the inquiry which the bankruptcy court must undertake in a §523(a)(5) action. Harrell, 754 F.2d at 907. In all other respects, Bedingfield remains controlling authority in this jurisdiction.

52 (8th Cir. 1986); In re Comer, 27 B.R. 1018, 1020-21 (9th Cir. BAP 1983), aff'd on other grounds, 723 F.2d 737 (9th Cir. 1984). Contra, Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983). It is the substance of the obligation which is dispositive, not the form, characterization, or designation of the obligation under state law. Bedingfield, 42 B.R. at 645-46; Accord Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057 (8th Cir. 1983); Calhoun, 715 F.2d at 1109 Pauley v. Spong, 661 F.2d 6, 9 (2nd Cir. 1981). The Harrell court stated:

> The language used by Congress in §523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is "actually in the nature of alimony, maintenance, or support". The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support. The language does not suggest a precise inquiry into financial circumstances to determine precise levels of need or support; nor does the statutory language contemplate an ongoing assessment of need as circumstances change. 754 F.2d at 906 (emphasis original).

In analyzing this portion of the Harrell opinion, it is clear that only "a simple inquiry as to whether the obligation can legitimately be characterized as support" is needed. While the court did find that bankruptcy laws, not state law is controlling,

it did not explicitly fashion guidelines or otherwise set forth factors to be used in resolving the required "simple inquiry".[4] The controlling law in this Circuit decided under Section 17(a)(7) of the Bankruptcy Act[5] suggests that the threshold inquiry "requires a determination of the intention of the parties, as reflected by the substance of the agreement, viewed in the crucible of surrounding circumstances as illuminated by applicable state law". Crist, 632 F.2d at 1229; Accord Holt, 40 B.R. at 1012; Bedingfield, 42 B.R. at 646. In determining the "intention of the parties", reference to state law does not violate the clear mandate that bankruptcy law, not state law, controls. See Holt 40 B.R. at 1011 ("There is no federal bankruptcy law of alimony and support. Such obligations and the rights of the parties must be devined [sic] by reference to the reasoning of the well-established law of the states."); See also

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[4] Although the court did not set forth a laundry list of factors which the bankruptcy court should consider, it did state that a "precise inquiry into financial circumstances to determine precise levels of need or support" is not required. Furthermore, the court rejected the reasoning of those courts which conclude that an ongoing assessment of need is required. 754 F.2d at 906. These limitations on the §523(a)(5) inquiry reflect the court's concern for considerations of comity. 754 F.2d at 907.

[5] Section 17(a)(7) of the Bankruptcy Act provides in relevant part:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . are for alimony due or to become due, or for maintenance or support of wife or child . . .

Bedingfield, 42 B.R. at 645-46 ["While it is clear that Congress intended that federal law not state law should control the determination of when a debt is in the nature of alimony or support, it does not necessarily follow that state law must be ignored completely . . . . The point is that bankruptcy courts are not bound by state law where it defines an item as alimony, maintenance or support, as they are not bound to accept the characterization of an award as support or maintenance which is contained in the decree itself." (Citations omitted.)]; Accord Spong, 661 F.2d at 9. In addition to the state law factors used in determining alimony, the federal courts have employed a number of factors to determine whether the debt is actually in the nature of alimony, maintenance, or support. These factors include:

1) If the circumstances of the parties indicate that the recipient spouse needs support, but the divorce decree fails to explicitly provide for it, a so called "property settlement" is more in the nature of support, than property division. Shaver, 736 F.2d at 1316.

2) "[T]he presence of minor children and an imbalance in the relative income of the parties" may suggest that the parties intended to create a support obligation. Id. [citing In re Woods, 561 F.2d 27, 30 (7th Cir. 1977).]

3) If the divorce decree provides that an obligation therein terminates on the death or remarriage of the recipient spouse, the obligation sounds more in the nature of support than property division. Id. Conversely, an obligation of the donor spouse which survives the death or remarriage of the recipient spouse strongly supports an intent to divide property, but not an intent to create a support obligation. Adler v. Nicholas, 381 F.2d 168 (5th Cir. 1967).

4) Finally, to constitute support, a payment provision must not be manifestly unreasonable under traditional concepts of support taking into account all the provisions of the decree. See In re Brown, 74 B.R. 968 (Bankr. D.Conn. 1987) (College or post-high school education support obligation upheld as non-dischargeable).

The non-debtor spouse has the burden of proving that the debt is within the exception to discharge. Calhoun, 715 F.2d at 1111.

Accordingly, I conclude that the obligation placed on Debtor by the judgment of the District Court of Geary County, Kansas, is non-dischargeable. While that Court based its ruling on both an unjust enrichment and a support theory I find the Court's

conclusion that the amount awarded is "a minimum level of support" to be conclusive on the question of whether the sum was intended to be "actually in the nature of support". Certainly the amount of the award is not "manifestly unreasonable" under traditional state law concepts and can be "legitimately characterized" as support for Mrs. Brown.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that the debt of Defendant, Willie Brown, to Plaintiff, Sarah Brown, in the amount of $11,976.52 is declared non-dischargeable.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 6th day of October, 1989.

BK 95
(Rev. 8/83)

FILED
at 11 O'clock & 05 min. A M
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia PCB

United States Bankruptcy Court

Date 10/6/89

For the SOUTHERN District of GEORGIA

SARAH BROWN

Plaintiff

v.

WILLIE BROWN

Defendant

Case No. 89-40705

Adversary Proceeding No. 89-4066

JUDGMENT

☐ This proceeding having come on for trial or hearing before the court, the Honorable , United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

[OR]

☐ This proceeding having come on for trial before the court and a jury, the Honorable Lamar W. Davis, Jr. , United States Bankruptcy Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict.

[OR]

☐ The issues of this proceeding having been duly considered by the Honorable , United States Bankruptcy Judge, and a decision having been reached without trial or hearing.

IT IS ORDERED AND ADJUDGED:

That the Plaintiff, SARAH BROWN, shall recover of the Defendant, WILLIE BROWN, the principal sum of Eleven Thousand Nine Hundred Seventy-Six Dollars and Fifty-Two Cents ($11,976.52), together with interest at the rate of 8.19% per annum from date until paid in full.

UNITED STATES BANKRUPTCY COURT ★ GEORGIA

MARY C. BECTON
Clerk of Bankruptcy Court

[Seal of the U.S. Bankruptcy Court]

Date of issuance: 10/6/89

By: Patsy C. Burkhalter
Deputy Clerk